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Appeals Court Rules Cattle Marketing Agreements Are Not Anti-Competitive

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Market Report	Yr Ago	4 Wks Ago	8/26/05
Livestock and Products, Weekly Average			
Nebraska Slaughter Steers, 35-65% Choice, Live Weight	$82.95	$79.02	$81.59
Nebraska Feeder Steers, Med. & Large Frame, 550-600 lb	143.26	131.45	133.06
Nebraska Feeder Steers, Med. & Large Frame 750-800 lb	119.09	114.66	120.48
Choice Boxed Beef, 600-750 lb. Carcass	138.38	125.53	133.01
Western Corn Belt Base Hog Price Carcass, Negotiated	70.68	66.61	70.35
Feeder Pigs, National Direct 45 lbs, FOB	47.99	45.70	49.85
Pork Carcass Cutout, 185 lb. Carcass, 51-52% Lean	73.85	71.89	75.65
Slaughter Lambs, Ch. & Pr., 90-160 lbs., Shorn, Midwest	92.25	101.00	94.00
National Carcass Lamb Cutout, FOB	212.58	249.50	241.57
Crops, Daily Spot Prices			
Wheat, No. 1, H.W. Omaha, bu	3.20	3.02	*
Corn, No. 2, Yellow Omaha, bu	2.19	1.89	1.66
Soybeans, No. 1, Yellow Omaha, bu	6.14	6.58	5.87
Grain Sorghum, No. 2, Yellow Columbus, cwt	3.07	3.23	2.68
Oats, No. 2, Heavy Minneapolis, MN , bu	1.63	1.81	1.70
Hay			
Alfalfa, Large Square Bales, Good to Premium, RFV 160-185 Northeast Nebraska, ton	117.50	117.50	117.50
Alfalfa, Large Rounds, Good Platte Valley, ton	62.50	37.50	37.50
Grass Hay, Large Rounds, Good Northeast Nebraska, ton	57.50	52.50	52.50

* No market.

Traditionally cattle have been purchased for cash prices on the open market, at livestock auctions or directly from cattle producers. Cattle buyers from meatpackers negotiate with feedlot operators to purchase pens of cattle, attempting to estimate the average quality that the cattle will yield on the spot. Feedlot operators consider bids from competing packers and then decide which offer to accept. Cattle are delivered seven days from the date of the purchase.

One problem with the cash market approach is that occasionally packers would end up with too few cattle on a particular day to efficiently run their packing facility. Then packers would either pay a premium (often a hefty premium) to obtain sufficient cattle quickly to operate that day, close down or else operate at less than full capacity. These slaughter cattle price premiums raised the average price received by cash sellers of cattle.

In the 1980s the use of cattle "marketing agreements" began. Under these marketing agreements, cattle are purchased based on the previous week's average cash price, and then further adjusted by the cattle's grade and yield after they were slaughtered. The packer could call for delivery of the cattle at any time within two weeks. An advantage of the marketing agreement approach is that cattle buyers don't need to travel to feedlots all over the country to negotiate prices for pens of cattle. This saves time for both the feedlot operator and the cattle buyer. It also allowed packers to even out the supply of cattle so that they could avoid having to pay higher prices in order to keep their facilities operating at full capacity. Tyson, the largest beef packer in the U.S., purchases 30-50 percent of its cattle through marketing agreements.

Under the Packers & Stockyards Act of 1921 (the PSA) it is unlawful for meatpackers to engage in any "unfair, unjustly discriminatory or deceptive practice" or to "manipulate or control prices" of livestock purchased for slaughter. The PSA was adopted to prevent packers from continuing such clearly anti-competitive practices as e.g. Packer A agreeing not to bid against Packer B for Nebraska cattle if Packer B agreed not to bid against Packer A for Kansas cattle. Apparently it is an open legal question whether the use of cattle marketing agreements automatically violates the PSA. The Federal Appeals Court for the 11th Circuit recently ruled that cattle marketing agreements in and of themselves did not violate the PSA, but could violate the PSA if their use was anti-competitive.

The issue arose in the lawsuit *Pickett v. Tyson Fresh Meats*. Mr. Pickett is an Alabama cattle producer who contended that the use of marketing agreements by Tyson lowered cash prices and therefore violated the PSA. The jury agreed with Mr. Pickett and awarded the class of cash cattle sellers $1.28 billion in damages. The trial judge set aside the jury verdict and ruled that the use of marketing agreements by Tyson did not violate the PSA. The trial judge's ruling was affirmed on appeal by a three-judge panel of the 11th Circuit Federal Court of Appeals. The appeals court ruled that there were several legitimate business purposes for using cattle marketing agreements, including requiring less effort to acquire the necessary cattle to operate a slaughter facility, and better timing of cattle delivery to avoid live cattle shortages. There was considerable testimony at trial that many cattle sellers themselves will sell cattle only through marketing agreements and will not use the cash market. The appeals court ruled that seeking to avoid paying a premium on the cash market in order to have enough cattle to operate slaughter facilities efficiently was a legitimate business purpose and not a PSA violation. The appeals court concluded that Pickett had failed to prove that the use of marketing agreements was anti-competitive. Pickett's attorneys have stated that they will appeal the decision to the full panel of judges in the 11th Circuit, and if necessary to the U.S. Supreme Court.

Commentary. Some ag law specialists (who are more knowledgeable about the PSA than I) have expressed surprise at the court of appeals' ruling, apparently because the court based its ruling on antitrust and fair trade law in general instead of earlier PSA cases. What surprises me is that the Pickett plaintiffs felt that the use of marketing agreements was automatically anti-competitive. The pen-by-pen purchase of slaughter cattle seems archaic, and it is not surprising that some cattle sellers miss the opportunity to obtain a windfall profit when a packer is short of cattle on a particular day. But if the use of marketing agreements to reduce the need to pay this premium when the slaughter facility is short of cattle seems to fall far short of my conception of what constitutes anti-competitive business behavior. I understand that many ag producers, not just cattle producers, distrust futures markets, marketing agreements and the like on principle, in part because they may be subject to manipulation. But no one proved (or even alleged) that prices were being manipulated here, except that marketing agreements allowed packers to avoid paying premiums on days they came up short of cattle. Marketing agreements seem like a natural modernization of livestock marketing practices, which may be why some producers don't like it.

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